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# In the Supreme Court of the United States

OCTOBER TERM, 1979

ALAN ANGRIST, PETITIONER

*v.*

UNITED STATES OF AMERICA

HAROLD WEXLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### QUESTIONS PRESENTED

1. Whether an equipment lease is a security as defined in 18 U.S.C. 2311.

2. Whether petitioner Angrist was deprived of the effective assistance of counsel at trial.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-18)[1] is reported at 621 F. 2d 1218.

## JURISDICTION

The judgment of the court of appeals was entered on May 22, 1980. The petitions for a writ of certiorari were filed on June 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of unlawfully transporting forged securities, in violation of 18 U.S.C. 2314 and 2 (Count III), making false representations to a federally insured bank, in violation of 18 U.S.C. 1014 and 2 (Count IV), and conspiring to commit those offenses, in violation of 18 U.S.C. 371 (Count I).[2] Each petitioner was sentenced to concurrent terms of two years' imprisonment on Counts I and III, to be followed by three years' probation on Count IV. The court of appeals affirmed (Pet. App. A-1 to A-18).

The evidence at trial is set out in detail in the opinion of the court of appeals (Pet. App. A-1 to A-7). Briefly, it showed that in 1970 petitioners formed Alphabetland, Inc., a corporation engaged in the operation of pre-school nurseries and summer day camps. When fund raising failed in 1972, petitioners began offering Alphabetland franchises, in connection with which petitioners would sell

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[1]"Pet. App." refers to the appendix to the petition in No. 79-2013.

[2]Petitioners were acquitted on another count charging unlawful transportation of forged securities (Count II).

an existing school or a new school in return for cash down payments and promissory notes. When a new school was involved, petitioners would offer a nursery school equipment package, which most franchisees financed by entering into an "equipment lease" with Alphabetland. Under the equipment lease, the franchisee made payments over a period of 60 months, during which time Alphabetland retained title to the equipment. Pet. App. A-3. Although each equipment package cost Alphabetland approximately $15,000, the franchisee was charged $30,000 for it, and the total price of the leasing arrangement, including interest for five years, was more than $40,000. Pet. App. A-5 & n.1.

In an effort to alleviate its severe financial difficulties, in 1974 and 1975 Alphabetland entered into several loan agreements, out of which the indictment in this case arose. Middle States Leasing Company (MLS) lent Alphabetland approximately $270,000, the collateral for which included forged promissory notes and five discounted equipment leases, each of which was also forged. An MSL vice-president testified that if the leases had been genuine, they would have had commercial value, in that they represented the right to receive payment for the equipment. He also testified that the leases were marketable, in that they could be discounted to yet another financial institution. Pet. App. A-4 to A-6. Petitioners' transportation of one of the leases from West Hempstead, New York, to MSL's offices in Passaic, New Jersey, gave rise to the charge of interstate transportation of fraudulent securities on which they were convicted.

The London Company made a loan to petitioners of $100,000, which was similarly collateralized by seven forged promissory notes. Pet. App. A-6.[3]

Finally, petitioners sought a loan from the Maryland National Bank (MNB). In support of their loan application, petitioners submitted financial statements, a list of opening dates for recently constructed schools, a list of schools then under construction, a list of notes receivable, a list of mortgages and notes payable and a term guaranty agreement. The lists of schools were fraudulent, in that none of the schools on the two lists was under construction, and the list of notes receivable included several notes that previously had been pledged elsewhere, contrary to petitioners' representations to MNB. In addition, the $100,000 London Company loan was not listed. When MNB discovered that the London Company had filed a lien against all present and future assets of Alphabetland, petitioners misrepresented the reason for that action and submitted a forged London Company document in support of their explanation. Pet. App. A-6 to A-7. Count IV, which alleged the making of false representations to a federally insured bank, arose out of the foregoing events.

Despite these loans, Alphabetland was unable to improve its financial position, and it declared bankruptcy in 1976. Pet. App. A-7.

## ARGUMENT

1. Petitioners contend (79-2013 Pet. 24-34; 79-2017 Pet. 11-21) that the forged equipment lease that formed the basis for the charge of interstate transportation of forged

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[3]Petitioners were not charged with unlawful transportation of these documents, but this loan was relevant to Count IV, which alleged the making of false representations to a federally insured bank.

securities is not a security within the statutory definition of that term. Since both petitioners' trial counsel conceded that an equipment lease is a security within the meaning of 18 U.S.C. 2311 and 2314 (Tr. 19, 1234), petitioners are foreclosed from seeking review of this issue. In any event, as the court of appeals held, the equipment leases involved in this case are "securities" as defined in 18 U.S.C. 2311.

That statute provides that

> "Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing * * *.[4]

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[4]At the outset, we note that the statute's failure specifically to list equipment leases does not indicate that they are excluded from the statute's coverage. "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the

The court of appeals found that the equipment leases in this case came within the foregoing definition because they "obviously transferred an 'interest in goods, wares and merchandise' " (Pet. App. A-13). In so holding, the court relied on the fact that under the terms of the equipment leases, "the lessee had no option to terminate the lease, and in the event of a default by the lessee, Alphabetland could take possession of the equipment and sell it, retain all prior payments of rent, and hold the lessee for the balance of the unpaid rent" (*ibid.*). The court below also found that the equipment leases "have 'intrinsic value' and 'are recognized and used as such in the regular channels of commerce' " (*ibid.*). The court relied on the MSL loan officer's testimony that the leases, if valid, could have been discounted to another financial institution and that MSL would not have made the loans to petitioner without the equipment leases as collateral. Indeed, as the court stated, "[t]he fact that Alphabetland used the leases as collateral for loans from Middle States Leasing would seem to foreclose [petitioners] from now asserting that the leases were without value" (*ibid.*). The court also recognized that the leases were valuable to petitioners because they guaranteed to them payments and interest on the equipment leased (*ibid.*).

The decision of the court of appeals is clearly correct. Merely denominating a transaction a lease does not make it one for legal purposes. Rather, courts will look to the nature of the agreement, and if it bears the substantive characteristics of an installment sales contract, whereby

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general principle." *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *American Fed. of Television & Radio Artists* v. *N.L.R.B.*, 462 F. 2d 887, 889-890 (D.C. Cir. 1972) ("the word 'includes' is a term of enlargement, not of limitation, and * * * the reference to certain entities or categories is not intended to exclude all others").

the seller retains title only to secure the obligation of the buyer to pay for the goods, courts will treat it as such. Among other factors, courts will consider whether title will pass to the lessee at the expiration of the lease, with or without the requirement of a payment to exercise an option to buy. If the payment for the option is nominal or if exercise of the option is the only economically sensible course for the lessee to take, courts will regard the transaction as a secured sale. See generally J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 880-883 (2d ed. 1980); R. Henson, *Handbook on Secured Transactions* 44-48 (2d ed. 1979). Other factors are also taken into account, such as (White & Summers, *supra*, at 882-883 (footnotes omitted)):

> whether the lessee is required to insure the goods in favor of the lessor for a value equal to the total rental payments; the risk of loss or damage is on the lessee; the lessee is to pay for taxes, repairs and maintenance; there are default provisions governing acceleration and resale; a substantial, non-refundable deposit is required; the goods are to be selected from a third party by the lessee; the rental payments are equivalent to the cost of goods plus interest; the lessor lacks facilities to store or retake the goods, the lease is to be discounted with a bank; warranties normally found in a lease are excluded; the goods are fixtures impractical to remove. This list is not exhaustive. Nor is any one factor conclusive standing alone.

The lease attached to the petitions in this case contains most of the foregoing indicia of an installment sales contract. The rental and interest payments totaled over $40,000, more than twice the original cost of the equipment to petitioners. Pet. App. A-5 & n.1, A-19. The

lessee was obligated to maintain the equipment (*id.* at A-23 to A-24), to pay the taxes thereon (*id.* at A-24 to A-25), to insure the equipment in favor of the lessor for not less than the total unpaid rent and to maintain insurance against personal injury and property damage (*id.* at A-27 to A-28). The lessee bore the entire risk of loss (*id.* at A-33), and the lease was discounted with a bank. As the court of appeals found (*id.* at A-13), the lessee had no option to terminate the lease, and, in the event of a default by him, the lessor could declare the entire unpaid rental immediately due, take possession of the equipment and sell it, retain all prior payments, and hold the lessee liable for any balance of the unpaid rent. Moreover, upon expiration of the lease, the lessee could retain the goods by forfeiture of his $3,000 "security deposit" (*id.* at A-38).[5]

Under all of these circumstances, it is clear that the equipment lease in this case constituted "evidence of indebtedness" or an "instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise," and that, therefore, the court of appeals was correct in holding (*id.* at A-14) that "each equipment lease in this case is the type of instrument Congress intended to and did include in the definition contained in § 2311."

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[5]Petitioners assert (79-2013 Pet. 27; 79-2017 Pet. 18-20) that the lease contained no option to purchase. While the provision for retention of the goods by the lessee upon forfeiture of his deposit is not expressly designated an option to purchase (rather, it states that the lessor may retain the deposit as "liquidated damages"), viewing the substance of the lease over its form, it is clear that upon its expiration ownership of the goods passed to the lessee if he chose to forfeit his security deposit.

Contrary to petitioners' claims (79-2013 Pet. 25-26; 79-2017 Pet. 12-15), this holding does not conflict with any other decision. As petitioners themselves point out (79-2013 Pet. 30-31; 70-2017 Pet. 15), no other decision has dealt with the question of Section 2314's applicability to equipment leases. To be sure, some courts have declined to expand the definition of "security" to include such items as department store scrip (*United States* v. *Dunlap*, 573 F. 2d 1092 (9th Cir. 1978)), motor vehicle registration certificates (*United States* v. *Canton*, 470 F. 2d 861 (2d Cir. 1972)), airline tickets (*United States* v. *Jones*, 450 F. 2d 523 (5th Cir. 1971)), or credit card invoices (*Merrill* v. *United States*, 338 F. 2d 763 (5th Cir. 1964)). Even under the restrictive view of the statute espoused by those cases, however, the equipment lease at issue here would qualify as a security under the statute. This case, therefore, is an inappropriate one for review of the alleged divergence among the circuits.

2. Petitioner Angrist raises (Pet. 3-4, 14-24) several technical, nonprejudicial alleged deficiencies of his trial counsel, arguing that the Court should grant his petition in order to resolve the conflict among the circuits regarding the standard to be employed in finding ineffective assistance of counsel (compare *Cooper* v. *Fitzharris*, 586 F. 2d 1325, 1328 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("reasonably competent and effective representation"), with *Indiviglio* v. *United States*, 612 F. 2d 624, 626-627 (2d Cir. 1979), cert. denied, U.S. (1980) ("farce and mockery of justice")). The present case is not an appropriate vehicle for the resolution of that conceded conflict, however, since under either standard the conduct of petitioner's counsel, rendered over the course of a six-day trial that resulted in the jury's acquittal of petitioner on one of the four counts with which he was charged, was within "the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 770-771 (1970).

Specifically, petitioner Angrist asserts that he was denied effective assistance of counsel by his trial attorney's (1) concession that an equipment lease is a security within the meaning of 18 U.S.C. 2311; (2) failure to move to dismiss the count of the indictment alleging interstate transportation of forged securities on the ground that it did not charge any facts that would show that an equipment lease is a security; (3) failure to move to dismiss the count of the indictment alleging the making of false representations on the ground that it did not specify exactly what entires among the 32 pages that petitioners allegedly submitted to the bank were alleged to be false or "the manner in which the 32 pages of documents alleged to be misleading were, in fact, misleading" (79-2013 Pet. 3); (4) failure to seek a bill of particulars to ascertain what entries in the 32 pages were claimed to be false; (5) failure to submit meaningful requests to charge the jury; and (6) admission on the record that he had never participated in a case involving expert witnesses.[6]

Since, as discussed above and as found by the court of appeals, the equipment lease in this case clearly constituted a security within the meaning of 18 U.S.C. 2311, petitioner Angrist could not have been prejudiced by his counsel's concession of that point or by his related failures to move to dismiss the indictment or request jury instructions on that ground. With respect to points (2)

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[6]Petitioner Angrist also asserts that his trial attorney should have subpoenaed the books and records of Alphabetland or offered expert testimony to establish that the representations charged in Count IV were not fraudulent. Since this claim was not raised in the court of appeals, however, it is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

and (3), it is well established that an indictment will not be dismissed for insufficiency so long as it affords the defendant notice of the charge he must be prepared to meet at trial and provides an adequate record to prevent his being placed in jeopardy a second time for the same offense. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962); *United States* v. *Pandilidis*, 524 F. 2d 644, 648 (6th Cir. 1975), cert. denied, 424 U.S. 933 (1976). Since the counts charging interstate transportation of fraudulent securities and making false representations to a federally insured bank satisfied those requirements, petitioners were not entitled to dismissal of the indictment, and petitioner Angrist's counsel cannot be faulted for not requesting that relief. Nor can petitioner Angrist complain of his trial counsel's failure to seek a bill of particulars since, prior to trial, the government made an extensive voluntary disclosure of its case, and petitioner has not pointed to any instance of surprise at trial. The decision not to request that the jury be cautioned not to consider evidence of other uncharged forgeries as proof of Angrist's character would appear to be a matter of trial strategy. In any event, individual jury instructions that petitioner, with the benefit of hindsight, now theorizes could have been submitted, do not establish ineffective assistance of counsel. Finally, petitioner Angrist has not suggested how his trial counsel's statement that he had never participated in a case involving expert witnesses

rendered his assistance ineffective. Indeed, petitioner's counsel called as a witness his own handwriting expert, whose testimony appears to have been instrumental in securing petitioner Angrist's acquittal on the second interstate transportation of fraudulent securities count.[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Count II charged petitioners with the interstate transportation of forged equipment leases bearing the names of Nicole Kimmel and Gary Walter. Count III charged petitioners with the interstate transportation of a forged equipment lease bearing the name of David Kelly. Petitioner Angrist's handwriting expert testified unequivocally that the "signature" of Gary Walter was not written by petitioner Angrist (Tr. 1188). The expert's opinion that petitioner Angrist had not signed David Kelly's name was "not as strong" (Tr. 1189). As stated above, petitioners were convicted on Count III (Kelly lease) and acquitted on Count II (Kimmel and Walter leases).

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